Supreme Court, U.S.
FILED
MAY 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-406

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE A. ARIYOSHI, GOVERNOR OF HAWAII, ET AL.,
PETITIONERS

v.

SELWYN A. ROBINSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a 1973 decision of the Supreme Court of Hawaii constituted final governmental action that could be a "taking" of respondents' rights to waters of a river in that State, notwithstanding a subsequent decision of the Supreme Court of Hawaii that contemplates further proceedings in state court on matters pertaining to respondents' right to divert water from the river.

2. Whether the rejection by the Supreme Court of Hawaii of respondents' petitions for rehearing, which contended that that court's 1973 decision resulted in a taking of respondents' property without just compensation or due process, constituted a final determination of the federal claims that cannot be reviewed in these separate proceedings in federal court.

3. Whether the Hawaii Supreme Court's rejection of, or failure to address, respondents' taking claim at the time of the consideration of their rehearing petitions deprived them of due process of law, on the ground that respondents were not afforded an adequate opportunity to be heard on the taking question.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

This case involves the definition of rights to the use of the waters of the Hanapepe River on the Island of Kauai in Hawaii. The court of appeals held that the decision of the Supreme Court of Hawaii in *McBryde Sugar Co.* v. *Robinson*, 54 Hawaii 174, 504 P.2d 1380 (1973), appeal dismissed and certs. denied, 417 U.S. 962 and 1976 (1974), deprived respondents of "vested" water rights established by prior law and thereby resulted in an unconstitutional taking of respondents' property without the payment of just compensation. In our view, however, the subsequent decision by the Supreme Court of Hawaii on questions certified to it by the court below (Pet. App. 14a-55a) makes clear that the decision in *McBryde* was not a final determination of respondents'

rights that can give rise to a ripe taking claim under *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, No. 84-4 (June 28, 1985).

1. The watershed of the Hanapepe River is about 15 miles long and from two to five miles wide. The northerly portion of the watershed reaches up toward Mount Waialeale, where the annual rainfall of 400 to 500 inches is among the heaviest in the world. The lower portion, by contrast, receives relatively little rainfall. About halfway down the watershed, the Koula and Manuahi streams join to form the Hanapepe River. The volume of water in the watershed generally ranges between 32 and 145 million gallons per day (gpd). Pet. App. 200a, 202a, 216a.

In the Great Mahele or division of Hawaiian lands in the mid-Nineteenth Century (see *Kaiser Aetna* v. *United States*, 444 U.S. 164, 166-167 (1979)), the Ahupuaa of Hanapepe,[1] roughly equivalent to the watershed of the Hanapepe River and its tributaries, was designated as crown land (Pet. App. 200a). The portion of the watershed above the confluence of the Manuahi and Koula is comprised of lesser divisions of land, known as the ilis kupono of Manuahi and Koula, which are now owned by respondents Robinson, et al. Respondent McBryde Sugar Co. owns land in the Ahupuaa of Hanapepe below the confluence of the Manuahi and Koula (*id.* at 201a, 207a). The Robinsons, McBryde and the other respondents (known as the small owners), as well as the State, are successors in interest to the owners of ancient taro plots in the watershed that were cultivated at the time of the Great Mahele (*id.* at 224a).

2. Beginning in 1891, Gay and Robinson (G&R) built a dam and a system of ditches to deliver water from the Koula stream to lands outside the Hanapepe Valley in the Makaweli watershed (Pet. App. 203a-208a). In the late 1920's, a dispute arose between the Territory of Hawaii and G&R concerning the latter's diversions. The Terri-

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[1] An ahupuaa is the largest division of land under the ancient Hawaii system. See *Kaiser Aetna*, 444 U.S. at 167.

tory, as the owner of the Ahupuaa of Hanapepe, claimed that it was the owner of all or part of the surplus waters of the stream, and it sought an injunction barring G&R from diverting water in derogation of that right. The parties stipulated to the existence of "normal daily surplus of waters" in the Hanapepe. *Territory* v. *Gay*, 31 Hawaii 376, 377, 381 (1930), aff'd, 52 F.2d 356 (9th Cir.), cert. denied, 284 U.S. 677 (1931).

The Supreme Court of the Territory dismissed the Territory's bill in equity, holding that G&R, as owner of the ili kupono of Koula, was the owner of the "normal" surplus waters (those not needed to satisfy other rights) arising on that land. 31 Hawaii at 388. The Chief Judge would have gone further and included "storm and freshet" surplus water under this rule, overruling the holding in *Carter* v. *Territory*, 24 Hawaii 47 (1917), that "storm and freshet" surplus water is to be apportioned according to the doctrine of riparian rights. 31 Hawaii at 403. A dissenting justice was of the view that both "normal" and "storm and freshet" surplus water should be governed by the doctrine of riparian rights under the rationale of the *Carter* decision. 31 Hawaii at 408-417. The Court of Appeals for the Ninth Circuit declined to disturb the judgment of the Supreme Court of the Territory on these questions of local property law (52 F.2d 356 (1931)), and this Court denied certiorari (284 U.S. 677 (1931)).

3. a. In the period from 1945 to 1949, G&R and its lessee, respondent Olokele Sugar Co., Ltd., constructed new delivery works that increased the amount of water G&R was able to divert from the Hanapepe watershed (Pet. App. 209a). This diminished the amount of water available to McBryde. Accordingly, in 1959, McBryde commenced an action against G&R in state court, seeking an adjudication that it had appurtenant, prescriptive or riparian rights to 11 million gpd from the Hanapepe and an injunction barring G&R from diverting water in a manner that interfered with McBryde's rights (Pet. App. 316a-317a). The State and the small owners also appeared as defendants (*id.* at 197a-198a).

The trial court quantified the appurtenant water rights of each of the parties for ancient taro lands.[2] It further held that G&R was the owner of *all* of the surplus water flowing in the Koula and Manuahi streams. The court recognized that the Supreme Court of the Territory had held in *Carter* v. *Territory* that "storm and freshet" surplus water was to be apportioned according to the doctrine of riparian rights (Pet. App. 250a) and that the subsequent decision in *Territory* v. *Gay* held only that the "normal" surplus water belonged to the owner of the land on which the water arose (Pet. App. 250a-251a). However, the court questioned whether *Carter* was "still the law of Hawaii" and believed that *Gay* "invite[d] reconsideration of the [*Carter*] rule" (Pet. App. 251a-252a).[3]

b. On January 10, 1973, the Supreme Court of Hawaii affirmed the award of appurtenant rights for ancient taro lands (Pet. App. 175a-178a), although it held that those rights apply only to the land to which they are appurtenant and do not extend to the transportation of water to another watershed (*id.* at 178a).

The Supreme Court reversed the judgment of the trial court in all other respects. It first rejected the trial court's holding that G&R, as owner of the ilis of Koula and Manuahi, owned all of the surplus water that arose on that land (Pet. App. 167a-174a). Quoting the principles adopted by the Land Commission and approved by the legislature in 1846, the Supreme Court held that at

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[2] The court found the following acres of ancient taro lands and corresponding water rights: McBryde (98.21 acres; 4,915,400 gpd); the State (83.27 acres; 4,167,650 gpd); the small owners (29.11 acres; 1,456,950 gpd); G&R, for lands below Koula and Manuahi (30.63 acres; 1,533,050 gpd). Pet. App. 218-233a, 246a-250a, 259a-260a.

[3] The only exception to the trial court's award of all surplus water to G&R was for 2,084,600 gpd that the court concluded McBryde had acquired as against G&R by way of prescription (Pet. App. 214a-215a, 246a, 253a-257a). The Hawaii Supreme Court reversed that award (*id.* at 186a-187a), and it is not directly at issue here (see *id.* at 108a-109a, 266a-267a).

the time of the Great Mahele, the King did not convey any of his sovereign rights, including the right " 'to enforce the usufruct of lands for the common good' " (*id.* at 172a, 173a). Because the right to water is one of the most important usufructs, the right to water was reserved "for the people of Hawaii for their common good in all of the land grants" (*ibid.* (footnote omitted)). Accordingly, the Supreme Court declared that the State is the owner of the water in the Koula and Manuahi streams and Hanapepe River (*id.* at 174a). The Supreme Court recognized that this conclusion was inconsistent with *Territory* v. *Gay*, at least as regards "normal" surplus water (Pet. App. 167a). But it concluded that the relevant statements in two of the early decisions upon which the Territorial Supreme Court had relied in *Gay* were dicta and that *Carter* v. *Territory*, although applying riparian principles only to "storm and freshet" surplus water, was broader in its reasoning (Pet. App. 168a-169a). The court also overruled *Carter* v. *Territory*. holding that "storm and freshet" surplus water likewise was reserved to the State (Pet. App. 187a).

The Supreme Court further held that McBryde, the State, G&R, and other owners of land in the Hanapepe Valley have riparian water rights under an 1850 Act of the Hawaiian legislature, which provides that "[t]he people shall also have a right to drinking water, and running water, and the right of way" (Pet. App. 179a-180a & n.17). *Id.* at 178a-185a. The court explained that these owners are permitted to use the water flowing in the river without prejudicing the rights of others, although this right appertains only to land adjoining the water course (*id.* at 185a).

Finally, the Supreme Court concluded that the judgment in *Territory* v. *Gay* was res judicata as between the State and G&R, the only parties to that case (Pet. App. 164a-166a). However, the Court observed that the holding in *Territory* v. *Gay* was based only on an assumption, not a finding, that there actually would be "normal" surplus waters, because there had been no determination of the superior rights of others in the Hanapepe Valley.

In view of its recognition in *McBryde* of riparian rights to the flow of water without substantial diminution, the court found that there is no "normal" surplus to which G&R would be entitled under *Territory* v. *Gay* (Pet. App. 186a-187a).

c. McBryde, G&R, and the small owners petitioned for rehearing, challenging the Supreme Court's state-law rulings and contending that the decision violated their rights under the Just Compensation and Due Process Clauses. See, *e.g.*, Pet. App. 353a-381a. After supplemental briefing on two state-law issues and oral argument, the Supreme Court, with two dissents (*id.* at 113a-162a), reaffirmed its original judgment (*id.* at 112a-113a). This Court denied review. 417 U.S. 962 and 976 (1974).

4. a. While respondents' appeal and certiorari petitions were pending in this Court, the Robinson respondents commenced the present action in the United States District Court for the District of Hawaii (Pet. App. 271a-276a). McBryde, the small owners, and others intervened as plaintiffs. The complaint alleged that the decision in *McBryde* was "directly contrary" to the settled law of Hawaii and violated the Due Process and Just Compensation Clauses of the Fifth and Fourteenth Amendments. The district court rendered a decision in favor of respondents on October 26, 1977 (Pet. App. 56a-110a), concluding after an extensive analysis of the Hawaii Supreme Court precedents (*id.* at 64a-75a) that the *McBryde* decision constituted an abrupt change in the law (Pet. App. 107a). The court held that respondents' ownership of surplus waters and their right to transport water out of the watershed under pre-*McBryde* law were "vested" property rights and that enforcement of the decision in *McBryde* would result in an unconstitutional taking of those rights. The court accordingly enjoined petitioners from enforcing the judgment in *McBryde* (Pet. App. 266a-267a).

b. On petitioners' appeal, the court of appeals certified six questions to the Supreme Court of Hawaii concerning "the proper interpretation" of the *McBryde* decision

(Pet. App. 414a-415a). After briefing and oral argument, the Supreme Court issued an opinion explaining that the *McBryde* holding that the State owns the surplus water in the Hanapepe River did not refer to "ownership in the corporeal sense where the State may do with the property as it pleases" (Pet. App. 51a). Instead, it contemplated only the State's "retention of * * * authority to assure the continued existence and beneficial application of the resource for the common good" (*ibid.* (footnote omitted))—*i.e.*, a public trust as reflected in the 1850 State statute declaring the rights of the people to "running water" (*id.* at 52a-54a).

The Supreme Court also stressed that by recognizing riparian rights and limiting water rights generally to the land to which they are appurtenant, *MyBryde* "did not actually enjoin or explicitly prohibit the diversion of water from the watershed" (Pet. App. 19a). Instead, *McBryde* merely stated that the "private usufructory interests" in water were "not so broad as to include any inherent enforceable right to transmit water" beyond the appurtenant lands (Pet. App. 19a). Accordingly, *McBryde* was not "conclusive of the circumstances" in which a transfer might be enjoined, especially since such an action would be subject to the equitable doctrines of estoppel, laches, and public use (Pet. App. 19a-20a). The court made clear in this regard that "diversions will be restrained only after a careful assessment of the interests and circumstances involved indicates a need for restraint" (*id.* at 20a-21a).

With respect to the res judicata consequences of *McBryde* in any such action to enjoin diversions by respondents, the Supreme Court first held that "*McBryde* in its current posture has no bar and merger effect," because no final judgment has yet been entered in that case (Pet. App. 23a). Similarly, the court held that "issue preclusion would be confined to the quantification of appurtenant water rights [for ancient taro lands]," because only that portion of the state trial court's judgment was affirmed in *McBryde* (Pet. App. 23a-24a). The court acknowledged that *McBryde* also had confirmed the exist-

ence of riparian rights, delineated limitations on the transportation of water, and declared the State to be the owner of surplus water (Pet. App 23a). But these rulings, the court explained, would only be the "law of the case" in the "continuation of the case at the trial level" (*id.* at 24a). Moreover, the court stated that it would be necessary, "prior to any final judgment respecting the distribution of the waters of the Hanapepe," to resolve certain "factual and legal issues," including, "most significantly[,] the nature and scope of any remedies to be afforded the parties" (*id.* at 24a-25a). The Supreme Court likewise held that *McBryde* would not preclude an independent action by respondents in state court with respect to issues left unresolved by the *McBryde* opinion, including the application of the principles of *McBryde* to "existing diversions" (Pet. App. 42a). The court stressed that *McBryde* did not determine whether the cessation of any given diversion would constitute a "taking" (Pet. App. 42a).

Finally, the Supreme Court advised the court of appeals that state law prior to *McBryde* was unsettled and confusing (Pet. App. 42a-50a). In its view, only three cases addressed "surplus" waters in the 125 years between the Great Mahele and *McBryde*; in each, surplus water was treated differently, and "in none of them did the court even attempt to clearly define or quantify the nature of this right" (Pet. App. 47a-48a). The court also explained that these prior cases recognized that "surplus" water was a residual category, to which the undefined interests of other users were superior (*id.* at 49a).

In sum, the Supreme Court interpreted its *McBryde* decision as a reassertion of the sovereign authority to " 'enforce the usufructs of the land for the common good' " (Pet. App. 54a) and a rejection of respondents' assertion of "absolute and exclusive" control over the use of waters in the watershed (*id.* at 55a). The *McBryde* opinion, however, was only the beginning of "a necessary definition of the parameters of the State's authority," which would proceed on a case-by-case basis (Pet. App. 55a).

c. After the Supreme Court of Hawaii answered the certified questions, the court of appeals nevertheless held

that the decision in *McBryde* resulted in an unconstitutional taking of respondents' property (Pet. App. 1a-13a). The court of appeals found that respondents had "vested" property rights to divert water because they had relied on the decree in *Territory* v. *Gay* and constructed diversion works (Pet. App. 11a, 12a), and it held that *McBryde* could not "divest rights that were vested before the court announced the new law" (Pet. App. 12a). Although the court of appeals referred to the answers to the certified questions (*id.* at 5a), it did not address the substance of those answers, including the availability of means by which respondents could contest any attempt by the State to halt diversions. However, because petitioners had taken no steps to interfere with respondents' diversions, the court of appeals vacated the injunction that barred petitioners from seeking to enforce the decision in *McBryde* and affirmed only the district court's declaratory judgment (Pet. App. 13a).

ARGUMENT

There are lurking in this case a number of difficult and potentially important questions concerning (i) the respective roles of the state and federal courts in the ascertainment and enforcement of property rights created by state law, and (ii) the authority of a federal district court to entertain a suit raising issues of federal law that are intertwined with questions that previously were disposed of by the highest court of the State. The superimposition of these procedural questions on evolving and novel principles of Hawaiian water law makes this case one of extraordinary complexity. But as we see it, there is no occasion for the Court to explore those issues here. In its current posture, this case raises one legal issue that overshadows all else and suggests a simple and straightforward disposition.

The opinion of the Supreme Court of Hawaii in response to the questions certified to it by the court of appeals makes clear that the *McBryde* decision did not finally determine respondents' entitlement under state law to divert water from the Hanapepe River and its

tributaries. The decision in *McBryde* therefore was not the sort of "final" action by the State that could give rise to a ripe taking claim under this Court's decision in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, No. 84-4 (June 28, 1985). Because the judgment of the court of appeals constitutes a substantial intrusion into the state court proceedings in *McBryde* and may inhibit the development of state water law more generally, we suggest that the Court should grant the petition for a writ of certiorari, vacate the judgment, and remand the case to the court of appeals for further consideration in light of *Williamson County*.

1. In *Williamson County*, the Court held that a claim that a taking of property has been effected by zoning regulations is not ripe until the responsible administrative agency "has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." Slip op. 17. The Court found this finality requirement to be "compelled by the very nature of the inquiry required by the Just Compensation Clause" (*ibid.*), under which the Court has engaged in "ad hoc, factual inquiries into the circumstances of each particular case." *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 13. To assist in this assessment, the Court typically considers, inter alia, the "economic impact of the challenged action" and "the extent to which it interferes with reasonable investment-backed expectations." *Williamson County*, slip op. 17; *Connolly*, slip op. 13-15. "Those factors simply cannot be evaluated" until the administrative agency "has arrived at a definitive position on the issue that inflicts an actual, concrete injury" (slip op. 17, 19). The Court further held in *Williamson County* that in order for the finality requirement to be satisfied, the landowner must invoke available procedures for obtaining a variance, which might enable him to develop his property to the extent necessary to obviate any "taking" claim. Slip op. 14-17. Accord, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981); *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central*

Transportation Co. v. *New York City*, 438 U.S. 104, 136-137 (1978).

This case involves an alleged taking not as a result of the action of a state administrative agency, as in *Williamson County*, but as the result of a decision rendered by a state court that assertedly worked a radical change in state property law and upset settled expectations. But this distinction does not undermine the applicability of the finality requirement of *Williamson County* and related cases. For where the State has assigned to its courts the responsibility for defining and regulating property rights,[4] it is only after the courts have taken definitive action with respect to particular rights that the economic impact of the judicially fashioned rules and the extent of their interference with reasonable investment-backed expectations could be considered by this Court on direct view or by a federal district court considering a taking claim in a separate suit (if the latter would not be barred by the doctrine of *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), discussed at note 7, *infra*).

Application of the finality rule in this case also furthers the principles of comity that underlie the requirement that federal courts abstain from adjudicating federal questions that arise out of and could be presented in ongoing proceedings in state court. See, *e.g.*, *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 237-239 (1984); *Middlesex Ethics Committee* v. *Garden State Bar Ass'n*, 457 U.S. 423, 432-437 (1982); *Gibson* v. *Berryhill*, 411 U.S. 564, 577 (1973). The interest in comity is at its zenith where, as here, the premise of the taking claim is that a state court's interpretation or application of judicially fashioned principles of state law affecting property interests was allegedly erroneous and a sharp departure from prior law. In such a case, the state courts should have every opportunity, before rendering a final judgment, to correct or explain their rulings on questions

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[4] The state trial judge in *McBryde* exercised authority vested in him as commissioner of private ways and water rights under Hawaii Rev. Stat. §§ 234-30 to 234-36 (1955). See Pet. App. 197a.

of state law, to consider any claim that those state-law rulings would give rise to a taking of property in certain circumstances (see Pet. App. 42a), and otherwise to accommodate competing interests. Premature intervention into this process by the federal courts on a taking theory could have the untoward effect of freezing the evolution of state law. Cf. *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 82-85 (1980); *id.* at 92-93 (Marshall, J., concurring); *Munn* v. *Illinois*, 94 U.S. 113 (1877).

2. When the instant suit was commenced in federal district court in 1974, it might have appeared that the finality requirement of *Williamson County* was satisfied. The decision of the Supreme Court of Hawaii in *McBryde* had declared the State to be the owner of all surplus water in the Hanapepe watershed and seemed to bar the holders of appurtenant or riparian water rights from using water on other lands. Moreover, although G&R had been held in *Territory* v. *Gay* to be the owner of all "normal" surplus water, the recognition of riparian rights in *McBryde* apparently left no water in that residual category. Nor could prescriptive rights be recognized for the benefit of respondent McBryde because prescription does not run against the State. See pages 4-6, *supra*. Standing alone, these rulings might have been understood to be a conclusive determination under state law of the nature and extent of respondents' rights to divert water from the Hanapepe and its tributaries for use both within and without the watershed. In that event, the finality requirement of *Williamson County* and related cases would have been satisfied.

3. a. The answers to the certified questions rendered by the Hawaii Supreme Court in 1982, however, dispelled whatever air of finality had surrounded the decision in *McBryde*. Those answers, in the form of a published opinion rendered after briefing and oral argument by the parties, must be regarded as the dispositive exposition of the meaning and consequences of the *McBryde* decision as a matter of state law. Indeed, the court of appeals' express purpose in making the certification was to obtain an authoritative construction of the *McBryde* opin-

ion (see Pet. App. 414a), " 'which might avoid in whole or in part the necessity for federal-constitutional adjudication, or at least materially change the nature of the problem.' " *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976) (quoting *Harrison* v. *NAACP*, 360 U.S. 167, 177 (1959)). Yet when it received the answers to the questions, the court of appeals failed to appreciate their significance to the "taking" inquiry, and instead essentially ignored them. For example, the court of appeals failed even to mention, much less rebut, the Hawaii Supreme Court's explanation, given in direct response to one of the court of appeals' questions, that the law of Hawaii with regard to the ownership of surplus water was unclear prior to *McBryde* (Pet. App. 44a-51a).[5] But the court of appeals nevertheless held that respondents had "vested" rights based on state law prior to *McBryde* (Pet. App. 10a-12a).[6]

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[5] The courts below appear to have applied an essentially de novo standard of review to the state court's determination of the content of state property law (see Pet. App. 98a-103a). We believe that approach fails to accord sufficient deference to the state court. The court of appeals relied on the concurring opinion of Justice Stewart in *Hughes* v. *Washington*, 389 U.S. 290, 296-297 (1967), which stated that "[w]hether [a state court] decision * * * worked an unpredictable change in state law * * * inevitably presents a federal question for the determination of this Court." But that statement did not mean that federal courts may freely impose their own views on the content of state property law. Indeed, Justice Stewart would have restricted the scope of the federal court's inquiry to whether the state court's pronouncements were "reasonable." *Id.* at 296. The inquiry has been described in a related context as whether the state decision has "fair support" or a "fair and substantial basis." *Demorest* v. *City Bank Co.*, 321 U.S. 36, 42-43 (1944). If so, the federal court will not "substitute its own view of what should be deemed the better rule, for that of the state court" (*id.* at 42 (footnote omitted)).

[6] The court of appeals identified the actions that rendered the water rights "vested" as the decree in *Territory* v. *Gay* (Pet. App. 12a) and the construction of diversion works and past use of water (*id.* at 11a). The court apparently believed that any disturbance of those "vested" rights would of necessity effect an unconstitutional taking. In our view, this formulation of the circumstances in which a taking of respondents' asserted rights in water would occur is too

b. For present purposes, however, the importance of the Hawaii Supreme Court's answers to the certified questions is in their description of the issues of state law affecting respondents' rights that remain to be resolved *after* the Supreme Court's decision in *McBryde*—and

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simplistic, at least without a much firmer foundation in the law of Hawaii than is exhibited by the court's opinion. Cf. *Williamson County*, slip op. 18-19 n.12.

We do not dispute that the judgment of a court may vest a property right under governing law—as, for example, in the general adjudications that are conducted in many western States to settle all of the rights to the use of the waters of a particular stream. See *Nevada* v. *United States*, 463 U.S. 110, 130-134, 138-141 (1983). However, *Territory* v. *Gay* was not a general adjudication of all rights to the waters of the Hanapepe River, and it did not even quantify the respective rights of the Territory and G&R, the only parties to the case. Although the judgment in *Territory* v. *Gay* nevertheless has a certain res judicata effect as between those parties (see Pet. App. 28a-31a), it is not clear, as a matter of state law, that the judgment actually "vested" any property rights in G&R, much less in the other respondents in this case. Similarly, although the building of diversion works and the beneficial application of water may be important events in the "vesting" of water rights in those States that recognize the doctrine of prior appropriation (see *Nevada* v. *United States*, 463 U.S. at 123-126), those events are not necessarily determinative of the particular water rights claimed in this case, which are based in large measure on the mere ownership of certain land (ancient taro lands and ilis kupono).

We agree that, in the absence of a noxious use or similar adverse impact on others, past and present uses of property ordinarily must be respected if the implementation of a new regulatory program is to avoid giving rise to a taking of property within the meaning of the Just Compensation Clause. See *Penn Central*, 438 U.S. at 136; *id.* at 144-145 (Rehnquist, J., dissenting). Nevertheless, the Court has held that, in certain circumstances, even an existing use may be proscribed without effecting a taking. See *id.* at 125-126. At the same time, a prohibition against the future exercise of a previously uninvoked incident of ownership may, in the proper case, effect a taking. See *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 4. Thus, to the extent the decision of the court of appeals is based on concepts of "vesting" that are not rooted in state law, it results in a declaration regarding the circumstances in which a taking will be found that is potentially both under- and over-inclusive.

that apparently remain open in further proceedings in *McBryde* itself. First, contrary to what appears to have been the parties' prior understanding (see, *e.g.*, Pet. App. 39a n.22), the answers to the certified questions now make clear that the decision in *McBryde* did not constitute the final disposition of that case (Pet. App. 23a-24a). The only determination with res judicata effect was the quantification of the appurtenant water rights for ancient taro lands, which was affirmed in *McBryde* and is not at issue here. The Supreme Court's reversal of the remainder of the trial court's judgment simply rendered that remainder void, thereby permitting a "continuation of the case at the trial level" with regard to all aspects of the case except the quantification of appurtenant water rights for ancient taro lands (Pet. App. 24a).

The Supreme Court recognized that it also had addressed other issues in its opinion in *McBryde*: it "confirmed the existence of riparian rights, delineated limitations on the right to transport appurtenant and riparian waters, and found that the State was the owner of surplus waters" (Pet. App. 23a). But because it did not give instructions to the trial court on these questions or exercise its own authority to render a final judgment, the court's rulings on these questions have only the status of the " 'law of the case' " in the further proceedings that must take place in the trial court before a final judgment is entered (*id.* at 24a). The Supreme Court explained that those rulings would "serve as a foundation" for such further proceedings but "would not necessarily be completely dispositive" of them, because the doctrine of the law of the case is " 'not subject to the inflexibility of res judicata' " (*id.* at 24a & n.9, quoting *Glover* v. *Fong*, 42 Hawaii 560, 578 (1958)). Thus, although the Supreme Court has expressed its opinion at an interlocutory stage of the proceedings on questions of law that might eventually affect respondents' property rights, it has not incorporated those rulings into a final judgment that has a binding effect on respondents. And

until it does so, the Supreme Court presumably retains the authority to alter its rulings. Compare *Arizona* v. *California*, 460 U.S. 605, 618-619 (1983).

This case therefore is in the same posture in which the administrative proceedings in *Williamson County* would have been if the Planning Commission had expressed its opinion on certain legal issues but had not yet denied the developer's subdivision application. In that event, the developer clearly would not have obtained the requisite "final decision" regarding if and how it would be permitted to develop the land, and it therefore would not have a ripe taking claim. *Williamson County*, slip op. 17. So here, until judicial proceedings are "complete" (*id.* at 22), the responsible state entity has not rendered its "final decision" that binds respondents and has concrete legal consequences for them. At least until that time, respondents may continue to divert water. In short, the mere rendering of a legal opinion at an interlocutory stage of proceedings in state court concerning respondents' rights does not constitute a "taking" of their property. *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 15 (1984); *Agins*, 447 U.S. at 263 n.9; *Danforth* v. *United States*, 308 U.S. 271, 285 (1939).

Nor is this an instance in which further proceedings in state court would have no effect on respondents' taking claim. Cf. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 477-487 (1975). To the contrary, the Hawaii Supreme Court's answers to the certified questions establish that the decision in *McBryde* did *not* eradicate all bases for protection of respondents' diversions and that a number of issues bearing on that protection remain to be decided in state court.

For example, although the *McBryde* decision declares the State to be the owner of all surplus water in the Hanapepe watershed (Pet. App. 162a-174a), the answers to the certified questions make clear that *McBryde* did not have reference to ownership in the corporeal sense, under which the State could dispose of the water entirely as it pleases, but rather contemplated the retention by

the State of authority "to assure the continued existence and beneficial application of the resource for the common good" (Pet. App. 51a (footnote omitted)). As this Court has recognized, the public ownership theory is " 'but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' " *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 951 (1982) (quoting *Hughes* v. *Oklahoma*, 441 U.S. 322, 334 (1979), and *Toomer* v. *Witsell*, 334 U.S. 385, 402 (1948)). See also *Sporhase*, 458 U.S. at 951-954. But this Court has "made it quite clear that the mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking." *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 4-5.

Beyond this, *McBryde* and the answers to the certified questions establish only that the Robinson respondents do not own the surplus water in the sense of having the unfettered right to use it in any manner they choose, and that none of the respondents has "absolute and exclusive" interests in the water, including an "inherent enforceable right" to transmit water beyond the land to which their usufructory interests appertain (Pet. App. 19a, 55a). But the Supreme Court of Hawaii authoritatively held in the answers to the certified questions that the application of the general principles in the *McBryde* opinion to any particular diversions and the circumstances under which any existing diversions may continue were not addressed or decided in *McBryde*, even as the law of the case. Pet. App. 19a-21a, 23a-25a, 42a. The Supreme Court made clear, in fact, that diversions would be barred "only after a careful assessment of the interests * * * involved indicates a need for restraint" (*id.* at 21a) and that any action to restrain diversions would require consideration of the equitable doctrines of laches, estoppel, and public use (*id.* at 19a-20a). These questions apparently remain open in further proceedings in *McBryde* itself, since the answers to the certified questions state that among the "unresolved factual and legal issues" in

that case are "the nature and scope of any remedies to be afforded the parties" (Pet. App. 25a). They also may be addressed in an independent action brought in state court by either petitioner or respondent (*id.* at 19a-21a, 42a).

These procedures in state court by which respondents may be permitted to divert water afford the possibility for the very protection that the court of appeals held to be constitutionally compelled for what it termed respondents' "vested rights" (Pet. App. 10a-12a). Resort to state judicial procedures, either in *McBryde* itself or in an independent action, therefore is directly analogous to the application for a variance or similar administrative relief that this Court held in *Williamson County* (slip op. 13-18) and *Virginia Surface Mining* (452 U.S. at 297) might serve to permit uses of property to the extent necessary to obviate any taking problem. Thus, until the state courts have "arrived at a final, definitive position" (*Williamson County*, slip op. 17) regarding existing diversions, it cannot be determined whether respondent's interests will be so substantially impaired by an actual prohibition as to preclude "economically viable uses" of their alleged rights under pre-*McBryde* law (*Riverside Bayview Homes*, slip op. 5) or to undermine substantially their "investment backed expectations" (*Kaiser Aetna*, 444 U.S. at 175). See also *Penn Central*, 438 U.S. at 130-131; *Andrus* v. *Allard*, 444 U.S. 51, 66 (1979).

4. In sum, we believe it is quite clear on the basis of the answers to the certified questions that no final action that could amount to a "taking" of respondents' property has yet occurred in the *McBryde* case. Accordingly, this federal suit should be dismissed, so that any necessary state court proceedings may run their course and thereby perhaps obviate any taking claim, or at least sharpen the inquiry into the various factors that are relevant to such a claim. We recognize, however, that the decision of the court of appeals in this case was rendered before *Williamson County*, which greatly clarified the role of finality as a prerequisite to a taking claim. The Court therefore might wish to vacate the judgment below and

remand the case to the court of appeals for further consideration in light of *Williamson County*. In any event, the Court should grant the petition in order to eliminate the substantial intrusion by the courts below into the litigation in state court with regard to water rights in the Hanapepe watershed and, more generally, into the case-by-case development of state water law by the Supreme Court of Hawaii.[7]

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[7] If, as we submit, the appropriate disposition is for this case to be dismissed for lack of final action by the State that could give rise to a taking claim, the other issues presented by petitioners are of no moment here. Petitioners contend (Pet. 20-22; Pet. Reply Br. 6-8) that the Hawaii Supreme Court's decision in *McBryde* precludes respondents from bringing their taking claim in federal district court, because " 'a United States District Court has no authority to review final judgments of a state court in judicial proceedings. Review of such judgments may be had only in this Court' " (Pet. 20, quoting *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 482 (1983)). See *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923). However, it now is clear in light of the answers to the certified questions that the decision in *McBryde* was not a "final judgment or decree" of the Supreme Court of Hawaii that was subject to review by this Court under 28 U.S.C. 1257, because important questions remained to be decided in that case that would have a direct bearing on respondents' taking claim. The defect in the judgment below therefore is that it intrudes into *non-final* state court proceedings—a subject addressed not by *Feldman* and *Rooker*, but by the abstention doctrine as a general matter (see Pet. Reply Br. 9-10) and by the finality requirement of *Williamson County* in the particular context of a taking claim.

Petitioners' related contention (Pet. 24-26) that the full faith and credit statute, 28 U.S.C. 1738, bars relitigation of respondents' taking claim in this case is misplaced for similar reasons. As petitioners acknowledge, that statute " 'requires a federal court to look first to state preclusion law in determining the preclusive effects of a state court judgment' " (Pet. 24 (quoting *Marrese* v. *American Academy of Orthopaedic Surgeons*, No. 83-1452 (Mar. 4, 1985), slip op. 7)). See also *Parsons Steel, Inc.* v. *First Alabama Bank*, No. 84-1616 (Jan. 27, 1986). In this case, the Hawaii Supreme Court held in its answers to the certified questions that because no final judgment has been entered in *McBryde* on any issue other than the quantification of appurtenant water rights (which is not at issue here), the decision in *McBryde* has no bar-and-merger or issue-preclusion effect that is relevant to this case. At present, the

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of *Williamson County Regional Planning Commission* v. *Hamilton Bank*, No. 84-4 (June 28, 1985).

Respectfully submitted.

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MAY 1986

McBryde rulings regarding riparian rights, the transportability of water, and State ownership of surplus water, are merely the law of the case (Pet. App. 23a-24a). Thus, until a final judgment is entered in *McBryde* on other issues that relate directly to respondents' taking claim, neither the doctrine of res judicata nor the full faith and credit statute is the source of the bar to litigation in federal court. By the same token, when a final judgment *is* entered in *McBryde*, respondents will be free to present to this Court on direct review under 28 U.S.C. 1257 any constitutional objections to the effect that the actions of the state courts might have on their property rights—including their claim that the decision in *McBryde*, either on its face or as applied in future proceedings, results in an unconstitutional taking of their property without just compensation (see Pet. App. 42a).

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